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IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 91-669

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Petitioner,

v.

DAVID ALAN GORE,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Attorney General's petition states that the State is neither seeking certiorari review in this case because the Eleventh Circuit applied the law incorrectly, nor because the result reached by the Court of Appeals was wrong. See e.g., Petition for Writ of Certiorari, p. 13 ("Petitioner does not seek certiorari review because the Eleventh Circuit reached the wrong result in this particular case..."). The panel of the Court of Appeals was comprised of Chief Judge Tjoflat, Judge Fay, and Judge Johnson. The full Court denied the State's petition for in banc review on July 23, 1991, with no member of the Court suggesting that the panel's decision should be reviewed. See Gore v. Dugger, No. 89-4026 (11th Cir. July 23, 1991) (Order denying petition for rehearing in banc).

What the Petitioner does say is that certiorari review should be granted because of an alleged "intracircuit" conflict in the Eleventh Circuit. However, as this response discusses, this case presents no controversy suggesting that the State's petition should be granted. A review of the decisions of the Court of Appeals, particularly the opinions authored by the Judges who presided in Mr. Gore's case, and consideration of the effect of the constitutional error "under the circumstances of this particular trial," Gore v. Dugger, 933 F.2d 904, 905 (11th Cir. 1991), so demonstrates. And such consideration demonstrates the manifest inaccuracy in the "Question" presented by the Petitioner in this case: contrary to the State's suggestion that the Court of Appeals refused to address the harmless error issue

because "any attempt to 'wrestle' with the issue would only result in further conflict" (petition, pp. i and 7), the Court of Appeals' ruling was that "[t]his panel unanimously agrees that under the circumstances of this particular trial" the error could not be deemed harmless. Gore, 933 F.2d at 905. The ruling was based on the panel's unanimous agreement that the error was not harmless in this case under any standard. This response discusses the propriety of the Court of Appeals' ruling, the fact that the Court's unanimous decision involves no controversy warranting the granting of the State's petition, and the fact that there is no conflict which is in any way relevant to the disposition of this case in the precedents of the Eleventh Circuit Court of Appeals.

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OPINIONS BELOW

The Respondent agrees with the Petitioner's statement.

JURISDICTION

The Respondent agrees with the Petitioner's statement.

CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent agrees with the Petitioner that this case involves the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Preliminary Statement

The Petitioner presented a general summary of the procedural history of this case at pages 3-6 of the petition. The summary, however, does not relate the significant nature of the mitigation involved in this case. Both the District Court and Court of Appeals found the evidence to be credible, reliable, and of a mitigating nature. Neither the veracity of the evidence nor its mitigating nature were challenged by the State before the District Court or Court of Appeals. The state trial court, however, on the basis of an objection presented by the trial prosecutor did not allow defense counsel to present it and thus precluded the jury from hearing it. This ruling was rendered notwithstanding the fact that the evidence plainly related to the background of the offender and the circumstances of the offense. See Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393 (1987). The District Court and Court of Appeals each found that the eighth amendment error could not be deemed harmless beyond a reasonable doubt. The full Court of Appeals

thereafter denied the State's petition for in banc rehearing with no member of the Court suggesting that the panel's ruling should be reconsidered.

In order to put this case in an appropriate perspective, and complementing the discussion presented in the argument section of this petition, the Respondent discusses below the mitigating evidence at issue and the state trial court's ruling -- a ruling which the District Court, Court of Appeals, the Petitioner (see Petition, p. 13) and the Respondent all agree was constitutionally erroneous. Thereafter, in its substantive argument, this response discusses the propriety of the ruling of the Court of Appeals and the fact that no conflict, question, or other ground warranting the granting of the State's petition is involved in this case.

B. The Mitigation

1. Alcohol and Drug Use Evidence

Prior to the presentation of evidence in the penalty phase, the judge sustained the State's objection to defense counsel's submission of evidence relating to Mr. Gore's alcohol/drug use on the day of the incident (R. 3047-56). Counsel indicated that Mr. Gore's brother-in-law, Bill Bowling, would testify "to the way David was acting.... He'll testify about some things he found in the house.... [A] half-empty bottle of vodka and a bunch of pills strewn around and a receipt for the bottle of vodka.... [T]hey'll testify because of the way he was acting, they believe he was drinking" (R. 3047-48). Family members and friends would have testified to the evidence of drinking and drug use and the

effects of the intoxication on Mr. Gore at times approximate to the offense. The trial court's response was:

> THE COURT: What's the relevancy of that? What's the issue of mitigation there? What's that in mitigation of?
>
> MR. LONG [DEFENSE COUNSEL]: It showed -- they'll testify because of the way he was acting, they believe he was drinking.
>
> THE COURT: That's not at issue. That's not a mitigating issue at all.

(R. 3048) (emphasis added).[1]

> THE COURT: I can't conceive of how it becomes relevant. That's not an issue in the case, is it, the fact that he had been drinking?
>
> MR. STONE [THE PROSECUTOR]: No, sir.
>
> MR. LONG: It is for mitigation, your Honor.
>
> THE COURT: The fact that he had been drinking?
>
> MR. LONG: No, your Honor.
>
> MR. MIDELIS [THE OTHER PROSECUTOR]: That would --
>
> MR. STONE: It would have been something that should have been brought up in the guilt or innocence phase to go to the matter of intent.
>
> MR. LONG: That's ridiculous because anything can be used by this jury as a mitigating circumstance. Anything.

(R. 3050). The trial court did not allow counsel to present the evidence (R. 3052).

In his pretrial deposition, Mr. Bowling had stated:

---

[1] "R." refers to the record on direct appeal to the Florida Supreme Court of the proceedings resulting in Respondent's death sentence. "PC" refers to the post-conviction record developed during proceedings in the state courts. These records, including the depositions and affidavits discussed herein, were submitted to and reviewed by the District Court and Court of Appeals.

Q: [H]ow well did you, uh, know, uh, David Gore?

A: Well, David's a--he's a funny sort of guy. He doesn't--if you talk to him he'll answer your questions and talk back to you but he's normally a very quiet person until he gets to drinking and when--Vodka's what he normally drinks with orange juice or straight, not to [sic] often straight but, um, when he drinks that he changes--his personality is totally different. He's like--it's like he's real happy, uh, easygoing and he doesn't much care what he says or does then. Whereas normally he's kind of, um, uh--I don't know what do you call it--what--he stays inside him-- introverted I guess you call it-- . . . . He's normally very introverted sort of person. All the time I've ever known him we--we used to go fishing and such together and he would hardly ever say anything. He would talk only whenever he had something he wanted to talk about or if he'd been drinking he'd talk your ears off.

Q: Well, when had you seen him drinking?

A: Oh, I'd say he normally drank around the house there when he first got his divorce from his wife, uh, Donna . . . . Uh, she kind of, uh, kept him pretty upset most of the time. Whenever I'd see him right--he'd come--he'd leave his house when they were married before the divorce and he'd come over to my in-laws house and, uh, he would maybe mix him up a drink or something of his father's, uh, Vodka and orange juice and he'd--he'd sit there and tap his foot 'cause when he got mad he always tapped his foot and he'd sit there and he'd talk to nobody or say nothing. He'd just sit there and keep it to himself . . . . Then, uh, he'd jump up all of a sudden go get in his car and go.

(Deposition of Bill Bowling, pp. 12-13).

Q: Totally changed? Would you almost say that and don't let me put words in your mouth, that it was, uh, uh, you know I wouldn't put words in anybody's mouth--strike that. Uh, would you almost say that, uh, it was a personality change once the alcohol got in his system?

A: Yeah, definitely.

(Id., pp. 15-16)(emphasis added).

Defense counsel also would have introduced the testimony of other witnesses and family members to demonstrate alcohol abuse,

alcoholism, and drug and alcohol use at the time of the crime. These witnesses would have substantiated the history of Mr. Gore's alcohol and drug dependency as well as his intoxication on the day of the offense:

> After the police were through searching my in-law's house, I found a gallon of vodka in David's room that was half empty. I also found a receipt from Lenny's Lounge for the vodka which indicated that it had been bought the day before David had been arrested. I also found a bunch of pills laying around the dresser in David's room. I think they were amphetamines.
>
> . . . .
>
> The only time I ever saw David really talk was when he was drinking. He would have just one drink and five or ten minutes later he was a completely different person. When David wasn't drinking, he would answer questions with just a "yes" or "no," and would never begin a conversation himself. When he's had a drink, he would be talking your ear off. He was more aggressive when he was drunk, and he would act in bizarre ways and do crazy things. When he was drinking he wouldn't even ccnsider what the results of his actions might be.
>
> Because I know David so well and have known him for so long, I knew he was drunk the day he was arrested and talked to the deputies. The only time he would talk loosely like that was when he was drunk. I didn't need to find the gallon of vodka in his room to know that he was high as a kite on July 26, 1983. I've never understood why the bottle of vodka and pills were never mentioned by the state, and why David wasn't tested for the alcohol and drugs in his blood.

(Affidavit of William Bowling, PC 928-29).

Mr. Bowling testified at the post-conviction hearing in the state courts, as he would have testified at trial had he been allowed:

> Q Mr. Bowling, did you ever have occasion to see David drink or to see him when he was intoxicated?
>
> A Yes. We had some Christmas dinners we would have together. We would make up a big dinner and my wife and I and my brother-in-law and his wife come over

and we would get together then and always mixed up usually like vodka and orange juice and I believe rum and coke is what some of the others had drank and he would come in and have one drink and he would come in rather quiet like and after when he come in he would cheer up, talking everybody's head off, talking and --

(Testimony of William Bowling, PC 403.)

Q Let me put it this way. The day after David had been arrested, did you go to the house, to David's parent's house?

A Yes, I called the sheriff and asked permission to come feed the cattle, I had to fill up the water basins and I couldn't go until they were done with their investigations of course. And they gave me permission to come feed the cattle and I was the first one back in the house after the sheriffs and all were done with their investigation.

Q Okay. And you proceeded to go in the house and to clean it up?

A Yes, I did. I went in through the living room straightening up. Everything was thrown around and in David's bedroom is where I found the biggest mess. I found the drawers in the dresser that were dumped all over the floor and scattered all over and dumped up against the walls. And in the closet I found a gallon of Smirnoff's and half of it was gone. And I looked at it and I was wondering why it hadn't been taken as evidence since they were supposed to be collecting evidence around the house.

I made my way into his bedroom and on top of the dresser I found some black pills, and they were scattered all over the dresser, and I wondered why that wasn't taken because that seemed like it would be important evidence. But it was all left there like all of the other mess.

Q Did you clean up other parts of the house?

A yes.

Q Did you find anything else that related to these things that you found in David's room?

A Yes, I went out to get a bucket and mop and when I went out back in the back corner of the house in the utility room I found a mop but the bucket was missing. I went out back and I found a yellow bucket with a brown bag shoved down inside with a little bit

of water and I took it out of the bucket and a receipt fell out of it from Lennie's Lounge for the purchase of vodka.

Q Do you recall the date on that receipt?

A Yes, the date was dated the evening before the incident was the date on it. I noted that, I didn't know what it was doing out back there.

(PC 407-09).

Other family members also would have provided compelling evidence of Mr. Gore's history of alcohol and drug abuse, and the effects of his intoxication on his behavior on the day of the offense. For example, Mr. Gore's sister would have testified:

I did, however, see pictures of David right after his arrest on television and in the newspaper. When I saw those pictures, I said "That isn't David." I had never seen his eyes look that way before. It was like looking into the eyes of a stranger.

I now believe that the strange appearance of David's eyes were the result of his intoxication. After attending his trial, there is no doubt in my mind that David was being affected by drugs or alcohol the day of his arrest. In the days that followed his arrest I had seen evidence that he had been using drugs and alcohol right before his arrest. My husband had found a half filled gallon of vodka in David's room. He also found some pills which were clear capsules with blue and white beads. I flushed these pills down the toilet in order to ensure that my two-and-half year old son would not accidentally take some. I also noticed an aspirin-bottle with a clear yellowish paste in it.

When I heard the tape of David's confession being played at the trial, I knew for certain that he was drunk at the time. David was much too talkative during his interview with the detectives for him to have been sober. David has been an exceptionally quiet person his entire life. He has difficulty carrying on a conversation. He's very shy and withdrawn. The only time I can remember him being talkative was when he was drinking.

(Affidavit of Wendy Bowling, PC 919-20).

Mr. Gore's mother would have similarly testified, had she

been allowed to do so:

> The only time that David was ever talkative was when he was drinking. After just one beer, his entire personality would begin to change.
>
> Even before David was arrested in 1983, I had seen evidence that he had a problem with drugs. After David had been released from prison following his conviction for armed trespassing, Wendy and I found some white powdered pills in a collection of letters he had brought back from the prison. Another time my husband noticed that some of the valiums that had been prescribed to him were missing, and we knew for sure that David had been the one who had taken them.
>
> I was in North Carolina when David was arrested for the murder of Lynn Elliott, but I am certain that he was intoxicated that day. At David's trial they played the tape of his interview with the sheriff's office after his arrest. David was very talkative throughout the entire tape. The only time that I have ever seen David talk like that was after he had been drinking.

(Affidavit of Velma Gore, PC 910-11). Mrs. Gore testified at the state court post-conviction hearing:

> Q Mrs. Gore, could you tell Judge what David was like when he would drink?
>
> A Well, David, like I say, he was a quiet child and quiet person. He never talked much but you could see a change in David after he would have maybe one beer or something. You know, he would be very talkative and just a complete different person.
>
> Q His personality would change?
>
> A Yes.
>
> Q He would be more outgoing?
>
> A Yes, he would.
>
> Q Did you ever have an occasion to listen to a taped confession of David?
>
> A Yes, I did.
>
> Q And what were you impressions when you heard that taped confession?

A Well, my first impression was that it was not David. I mean it was not --

Q What do you mean by that, that it was not David?

A Well, it just didn't sound like him, he was too talkative, he was fast talking and it was just not his normal way of talking.

Q That fast talking, what did that remind you of?

A When he was drinking.

(Testimony of Velma Gore, PC 536).

Q Did you ever have occasion to believe that David might be using drugs other than alcohol?

A When? When could you--

Q When David was living with you after his . . . .

A Yes. I think several times that I had seen a few signs of David not only taking alcohol, but drugs, too.

Q And what were those signs, ma'am?

A Well, his father had had a prescription of Valium filled at one time and it was almost a complete, you know, prescription full, and he didn't use but just a few and then all of a sudden there were only two in there, in the bottle.

Q And only your husband and yourself and David were living at the house at the time; is that right?

A True.

Q And you didn't take those, did you?

A No.

Q Did you ever see any other signs that David might also have a drug abuse problem in addition to his alcohol abuse?

A Yes. In some of his letters, well, papers, not just letters, in a suitcase that he brought back with him there were some tablets, white powder substance in some of them. And there was another

occasion that there was, I think a blue and white capsule that was on his bedroom floor when his sister and I were straightening his bedroom up after he was arrested.

Q Did you ever visit David in Belle Glades?

A Yes.

Q Did David ever make a request for you to bring in some weight loss pills?

A Yes. He asked me on several occasions if I could bring him in some of the extra strength weight loss capsules.

Q When you heard that what did you think?

A Well, I asked him really, I mean why, he was losing weight, and I think my sister Mildred Waterfield was there and we made a remark that we couldn't take them because it would make us feel different. And he said, well, that's what he liked about it.

Q He liked the rush from those pills?

A Yes. Yes.

(PC 556-58).

Mr. Gore's father would have provided similar evidence:

David never really could drink much. He's not smart and he's easy to lead into most anything, but until he starts drinking he could at least try to resist bad influences. He would do things when he was drinking and later come back to his right mind and act as though a different person had been the one drinking and acting strange. David was normally very shy and quiet. Drinking would just turn him into a totally different personality and he'd be aggressive and completely unlike himself.

I know that Freddie got David started doing drugs too. He would leave the evidence of it in his room at the house, and Velma would find it sometimes. She found some white powder in there about 7 or 8 years ago and brought it to me. I tasted it, but I sure couldn't tell what it was. Not too long after that I was given a valium prescription for an illness, and I put the bottle away after I started feeling better and no longer needed the pills. One day Velma noticed that there were only a few pills left. Though we didn't confront him, we were sure David was the one that took

the pills.

(Affidavit of Alva Gore, PC 904). Like Mrs. Gore, Mr. Gore testified at the post-conviction hearing in the state trial court. Each would have testified to this evidence at the sentencing phase of their son's trial, had they been allowed to do so.

> Q Okay. What would happen when David would have a drink?
>
> A When David would drink his appearance would change, you know, I could tell when he was drinking and would come home because he was a little, acted a little different than he ordinarily would if he wasn't drinking. In other words, his eyes, when his eyes would be awful red and they are real glassy looking and at times he would talk a lot, get to talking a lot, and at times he would be real quiet. But I could tell when he was drinking because, you know, I could just tell the change in the looks of him and at times I've asked him, you know, when he come home what was wrong? I'd say, "What's wrong, David?" And he would say, "Nothing." And then I knew he was drinking pretty heavy.
>
> Q But you would see personality changes?
>
> A I would see personality changes when he was drinking.
>
> Q In those personality changes would David start talking a lot more?
>
> A Yes, sir. He would get a lot more talkative.
>
> Q Did there come a time, Mr. Gore, when you thought David may be taking other drugs, other than alcohol?
>
> A Yeah. Well, there was an incident, my wife found some kind of powdered substance in his room and she brought it to me and asked me what it was. And I looked at it and I even tasted of it but I couldn't tell what it was because I just didn't know what it was.
>
> Q And where did you find that white substance?
>
> A It was in his bedroom. I believe it was

under the bed, I believe it was under the bed.

(Testimony of Alva Gore, PC 463-65).

A Well, I knew he was drinking more because he was staying at the house more, he was coming over to my house and he was around me quite a bit and I knew when he was drinking more. He was drinking a lot more than usual. Because I could tell it.

Q Would you see the same kind of personality change that you talked about before?

A Right. I could see that. And a lot of times David would come home and he was just so withdrawn when he would come home he didn't hardly talk to us or his mother at all. And I think he, I mean that's the reason I guess that he started drinking so much. I don't know that to be a fact but during that point in time he was, I could tell, being around him I knew he was drinking a lot more on his actions and come home with his face red and his eyes all red.

. . . .

Q Now, Mr. Gore, did there come a time after David had been arrested in this case that you heard a tape played with David's confession on it?

A Yes, I heard a tape.

Q Do you remember hearing that tape?

A Yes, sir.

Q Can you tell Judge what David's voice sounded like on that tape and what was your opinion when you heard that tape as to David's state of mind?

A Well, when I heard the tape played in the court, that's where I heard it played, David really didn't sound like hisself, he didn't sound like his voice. I mean part of it was his voice but part of it didn't sound like his voice. I mean he just talked in a different tone than he usually does.

Q What about how quickly he was talking? Did it sound like the quiet David or did it sound like another David that you knew?

A Well, it sounded, well, no, it didn't sound like a quiet side. It sounded like it was more so the other side of David, the talkative side.

Q When did you see David get talkative? What would make David get talkative?

A Well, he would get pretty talkative every time he got on alcohol, he would get a lot more talkative.

Q Did you draw that conclusion when you heard that tape?

A Yeah, yes, I drawed a conclusion that he must have been drinking to sound like that.

(PC 469-71).

Mr. Gore's uncle would have provided similar testimony, and could have testified as to Mr. Gore's state of intoxication shortly before the offense:

Q Mr. Gore, did you ever see David drink?

A Yes, sir.

Q Did you ever see him other times when he appeared to be under the influence of drugs or alcohol?

A Yes, sir.

Q Can you tell us how David was different on those times when he was under the influence of drugs or alcohol from the other times you just described to us?

A Well, it's like he was all mouth then and he would get a few drinks and I couldn't tell if it was drinks or controlled substance. But I can tell when somebody is, if I listen to them long enough and I know Mr. Vocelle many years, and I think he can agree with me what I'm saying. Somebody that don't talk and they get a couple beer, whatever it might be, then the mouth starts pretty well --

Q This is the way David became? David became talkative?

A I would say, I could always tell when he had something. I didn't know what. Whether it might be marijuana or -- I couldn't say what he was ever on.

Q Okay. Is it fair to say when David was on these things that he was a completely different person?

A By all means.

. . . .

Q Can you tell me any other changes in David's personality when he was on these substances other than being talkative?

A Well, I don't know if it was jokingly or if he was going to take his uncle on, "Come on I'll whip you." And I'd say, "Come on David, let's knock it off here." That's about the only thing that I can answer to that really.

Q So he would challenge you, try and take you on?

A He would challenge anybody.

Q When he was drinking?

A Yes, sir.

. . . .

Q Let's first establish, do you recall when David was arrested, not the date, but do you have in your mind when David was arrested?

A The very next day.

Q So you saw him the night before; is that right?

A Yes, sir. Yes, sir.

. . . .

Q He was heavy under the influence of something?

A Yes, sir. Something. I couldn't say what. I could not say what he was on but he was definitely on something.

Q And it wasn't just moderate, I mean he wasn't a little bit high or a little bit drunk, he was very intoxicated?

A Like I said, he was wiped out.

Q Okay.

A He could still maneuver but -- do you understand when I say wiped out?

Q I understand, sir.

A I don't mean you can't walk or you could stagger a little bit. I'm talking about wiped out, he was very much under the influence of something. I don't know, I still want to call you Mr. Vocelle.

Q What was David's speech like when he came to see you? How did he talk?

A His speech wasn't bad at all.

Q All right.

A But he would drift from one thing to the other. I sat down there, and I got behind my desk because to make my rounds, you know, every once in a while, and I was checking the pool, it was shortly after dark. He said, "Let's go swimming." And I said, "Son, I can't go swimming."

Q Where did David want you to go swimming at?

A Right behind my office there there is a big spa and real big swimming pool out there at Lakewood.

Q Did David have his swimming trunks on?

A No, he was going in with his clothes and all. And I said, "Son I can't -- " because I was just getting ready to lock it. Well, it must have been about 9 o'clock and I locked the gate and nobody could go in there after 9 o'clock because I locked it. So it had to be close to that.

Q Was David talking a lot?

A Yeah, like he needed some Pepto-Bismol or something like that.

Q Was this the quiet David that you had known?

A He was 100 percent, maybe 99 percent, I can't get in these percentages without my calculator, but he was heavily under the influence of something.

(Testimony of Joseph Gore, PC 368-71.)

Q Okay. Having seen David the night before he was arrested and having seen him completely wasted and hearing David had been arrested for this offense the next day, what did you think?

A I didn't believe it and I still don't. I

still don't believe it.

Q Do you think it might have had anything to do with the fact that David was intoxicated?

A That's the only time David would hurt a little puppy dog, that's the only time he could have done it, if he was under the influence of any kind of controlled substance, whether it be vodka or beer or whatever, you know, you can to go extreme with that or anything and I'm telling you because I have been to that extreme a few times. So and I don't think there is not too many people in this courtroom that hasn't.

Q You've testified that David was easily led. Was it even more -- could you lead David even easier when he was drunk? You told me a story one time out at your house about if you had some alcohol there and you had David; could you tell us that story?

A If I had alcohol there --

Q Yes, and if you had David there and you wanted to do something; do you recall that?

A Well, that's like a drug addict, if they want a rock, you know, they will sell their soul for it. And if he wanted a drink I'd say, "All right, David," if I happened to have a pint of whiskey or whatever it might be, "David, I want you to go over there and just slap him down," regardless of who, you know, if I would have wanted to, and he would have did it. And he was as much of a man, I guarantee you right now, he's a gentleman on top of that.

(PC 381-83).

Another of Mr. Gore's uncles, who was present at Mr. Gore's arrest and who observed his affect and demeanor immediately after the offense, would also have presented compellingly mitigating evidence in this regard:

Lonnie Gore was one of the officers from the sheriff's office who was present when David Gore was arrested for the murder of Lynn Elliott. Lonnie, who has known David since David was born, said that the David Gore he saw that day "was not David, at least not the David I had always known."

Lonnie said he was struck by the appearance of David's eyes that day. He had never seen his eyes look

> the way they did that day. They had a glassy, wild look to them. Lonnie believes that the strange appearance of David's eyes could have been caused by drugs or alcohol.

(Affidavit of Jonathan Broun, PC 933).

Defense counsel was ready to present a great deal of significant mitigation. The trial court, however, on the basis of the prosecutor's objection, excluded the evidence from the jury's consideration. As the affidavits and testimony presented to the state post-conviction courts and thereafter reviewed by the District Court and Court of Appeals demonstrated, the family members and others would have provided critical and compelling mitigating information regarding, inter alia, Mr. Gore's childhood and background, his emotional and mental development and impairments, his troubled marriage, his life-long dependent relationship with Freddy Waterfield, his ongoing problems with alcohol and substance abuse, his family's history of chronic alcoholism, and his diminished mental status at the time of the offense. Detailed expert mental health testimony was also presented to the state post-conviction courts which spoke to the veracity of the alcohol/drug use mitigation which counsel had sought to present, but was precluded from presenting, to the sentencing jury.

The evidence was summarized above. The affidavits submitted to the state post-conviction courts and then to the District Court on this issue related the following:

> My name is Alva Gore, and David Gore is my son. My wife and I raised our children in Vero Beach, Florida, and we now live in Pickens, South Carolina.
>
> I know in my own mind that David wasn't quite

right. I can't say exactly what was wrong with him, but he just didn't act like other children. He wouldn't associate with other people, though I often wished he would. He was such a withdrawn child, and this continued to be true as he grew up.

David had some very high fevers--105 and 106 degrees--when he was an infant. He went into convulsions with them once or twice. I've sometimes wondered if maybe those fevers didn't have something to do with him ending up with the kind of problems that he did.

David always bottled up his emotions, as far back as I can recollect. The only way I could ever tell when something was upsetting David was that his foot would start to tap. David would not say anything about what was bothering him but that foot would just tap and tap. This kind of behavior always struck me as kind of odd.

When I punished David, I usually did so by hitting him with a belt in the place God provided for receiving punishment, which is the butt. David's mother used both switches and a paddle to punish and train David. While I tried not to really hurt David or his sister, Wendy, I guess I was stronger than I knew. I once slapped my sister in the face and her face was paralyzed on that side as a result. I don't remember ever hitting David in the face, but I couldn't say I didn't. Things like that can happen out of pure anger and frustration.

David never was any good in school. One time the school said he cheated, and when they asked him why, he said it was because he was afraid of what his mother and me would do to him if he failed the test. I can't say that I ever paid much attention to his schooling. David just never had a mind to be smart, so him bringing home failing grades didn't surprise or concern me too much.

I always tried to provide for my family as best I could. My own father never had any money, and had to struggle to take care of us. He would hunt coon, frog and other things just to keep food on the table. When my wife, Velma, and I got married we lived in a 8 by 10 foot shack. By the time David was born we'd managed to build a 12 by 24 foot house out of second hand lumber. We had no money for windows, so I nailed roofing paper up to where the glass should have been. I got $100 worth of supplies for the house, and I paid back about $10 a month.

At first, we had no indoor plumbing at all. I eventually got a commode and put it into a corner of the house. We also drilled our own well and put in a 12 foot deep pipe. We had a kerosene heater to keep us warm. I wouldn't leave it on at night because of the expense. I'd get up in the morning and heat it. It would usually flare up, and I'd have to get back up and hit it to get it going right. Then I jump back into bed to get out of the cold.

Velma and I always tried to keep a little something on the table. David and his sister usually had cereal or toast for breakfast. Because I was making about $40 a week back then and went $5 to $10 in the hole each week, there were times when there just wasn't any money for groceries. Velma and I would kill alligators for money and buy groceries. I'd often hunt and fish for our supper, and when David was old enough he would go with me.

I know that growing up like this was hard on the children. Velma and I were used to it, but I wished I could have done more for my kids. Because David was so slow and odd, I feel like he suffered the most for not having a nice home, nice things and the special treatment he needed.

Velma comes from some hard luck herself. Her father, William Webb, was an old moonshiner and a vicious drunk. Velma and her sisters would have to hide under the bed or run out into the woods whenever he'd come home drunk. He got so drunk and mean that he'd threaten to kill them and just about scare them to death. The Webbs lived nearby, and William didn't get too much better as he aged.

Because of Velma's experiences with her father, she always hated for me to drink. Watching me drink really upsets her. I never really thought too much about my own drinking, but when David took it up about 10 years ago, I knew that was a mistake. His cousin, Freddie, got him started. Freddie was much smarter than David and could get David to do anything. He had an especially strong influence on David because David never really was able to make friends. David really needed Freddie, and Freddie knew it.

David never really could drink much. He's not smart and he's easy to lead into most anything, but until he starts drinking he could at least try to resist bad influences. He would do things when he was drinking and later come back to his right mind and act as though a different person had been the one drinking and acting strange. David was normally very shy and

quiet. Drinking would just turn him into a totally different personality and he'd be aggressive and completely unlike himself.

I know that Freddie got David started doing drugs too. He would leave the evidence of it in his room at the house, and Velma would find it sometimes. She found some white powder in there about 7 or 8 years ago and brought it to me. I tasted it, but I sure couldn't tell what it was. Not too long after that I was given a valium prescription for an illness, and I put the bottle away after I started feeling better and no longer needed the pills. One day Velma noticed that there were only a few pills left. Though we didn't confront him, we were sure David was the one that took the pills.

Even though I knew that David needed help, I was still completely unprepared for what happened on July 26, 1983. Velma wasn't prepared either. We were in the mountains when we got a message to call Vero Beach collect. We went down the mountain to a store to call. After I made the call and got into the car, Velma was pressuring me to tell her what it was about. I finally told her, and she tried so hard to jump out of the car that I had to pull off the road and calm her down.

After we got back to Vero, I talked with Roy Raymond, the second in command at the Sheriff's Office there. I knew David was out of his mind that day and so did Roy. I told Roy that had I been there I would have gone into the house myself to get David. Roy said they wouldn't have let me, that "that wasn't David in there." David has said the same thing to me, that he wasn't himself. He told me that when the police surrounded the house he just sat down at the kitchen table and had a glass of water. We agreed that that was no way for a normal person to respond to what was going on all around him.

I can't help but think that if I'd have gotten David some help 15 years ago things wouldn't have ended up like they did. That's something I have to live with. I just didn't know what to do for him or where to turn, but I know I should have done something.

(Affidavit of Alva Gore, PC 901-06).

My name is Velma Gore, and I am the mother of David Gore. I currently live in Pickens, South Carolina with my husband Alva Gore.

The house that David grew up in had to be built by my husband and myself. It started as a 12 foot by 24

foot room, and we tried to make additions to it whenever we had enough money. When David was young, our home was heated by a kerosene heater. My husband, and later David, hunted for our food. I had to make the children's clothes. When he was 14, David got a job working in orange groves, and he used that money to buy his own clothes and other necessities.

When David was 17 months old he somehow fell into a bed of stinging ants. He went into convulsions. By the time I got David to the doctor's office, his temperature was 105°. They gave him some kind of shots that after a while brought the fever down, but I have always wondered what the effects of that poison may have been on him.

Exactly one month later, he went into convulsions again. When he got to the doctor, his temperature was again 105°. The doctor showed me how to apply ice compresses and bathe him in alcohol, but the fever did not break for two days.

David's behavior always concerned me. As a child, David was very quiet and withdrawn. He had difficulty sustaining a conversation even with members of his own family. While his sister, Wendy, and I were and still are very close, as hard as I tried I could never get David to open up to me. I believe that David did not have the social skill necessary for a truly close relationship.

Throughout his entire life, there have been periods where David would for no apparent reason become completely withdrawn. I never knew what caused him to go into these moods and he never told me.

I had always wondered whether David needed professional help. Although I always knew there was something wrong with David, I never let myself think that things could have ended up like that. It aches my heart that we did not get him any help when he was younger. I now believe that if we had done that, he wouldn't have ended up like he did.

If David was really close to anybody growing up, it was Frederick Waterfield. However, his relationship with Freddy has always greatly troubled me. Freddy was David's idol, and he could get David to do anything he wanted him to. When David was with Freddy, he would behave in a manner completely different than when he was around anybody else. I was so concerned about Freddy and David's relationship that I was constantly making efforts to separate the two of them.

My attempts at separating them didn't work. Throughout their entire lives, Freddy and David were constant companions. Even after David married Donna, he and Freddy were always together. I was always afraid that with the type of influence that Freddy had over David, he was going to get David into trouble.

When David was a child he told me that he saw something red that glowed, that had sort of floated around his room. Later he told me it had come from a flying saucer.

David's children, Michael and Jonathan, mean everything to him. When Donna and David split up for the second time in 1981, and Donna got custody of his sons and prevented him from seeing them, David was absolutely devastated. I tried to console him, but he was too upset.

I remember one time we were discussing the situation with the children, David began crying and screaming at me, "You just don't understand!" It is the most emotional I have ever seen David. It was the first time I had ever seen him cry or yell at me.

The only time that David was ever talkative was when he was drinking. After just one beer, his entire personality would begin to change.

Even before David was arrested in 1983, I had seen evidence that he had a problem with drugs. After David had been released from prison following his conviction for armed trespassing, Wendy and I found some white powdered pills in a collection of letters he had brought back from the prison. Another time my husband noticed that some of the valiums that had been prescribed to him were missing, and we knew for sure that David had been the one who had taken them.

I was in North Carolina when David was arrested for the murder of Lynn Elliott, but I am certain that he was intoxicated that day. At David's trial they played the tape of his interview with the sheriff's office after his arrest. David was very talkative throughout the entire tape. The only time that I have ever seen David talk like that was after he had been drinking.

David later told me that the day he was arrested, he was considering ending his life. When the deputies had surrounded our house, they had warned David that he should come out with his hands up. David said that he considered lowering his hands and making a run for it, so that the deputies would have to shoot and kill him

immediately.

(Affidavit of Velma Gore, PC 908-12).

My name is Dorothy Stokes and David Gore is my nephew. His mother, Velma Gore, and I are sisters.

After the events of July 26, 1983, I believed David's problems were probably due in large measure to alcohol abuse. Alcoholism has devastated our families for generations. Both David's great-grandfather, Will Webb, and David's grandfather, William Webb were alcoholics. In that family there are uncles, aunts, cousins, nephews and nieces who suffer from alcoholism and many have been, are being, or should be treated for it.

The alcoholism in my family made growing up for me a nightmare. I was physically, mentally and sexually abused by members of my family. My step-father, who was David's grandfather, was violent and brutal when drinking. He beat me up and his cousins and father sexually assaulted me during the time I was growing up in his house. He made and sold moonshine whiskey and his drunken rampages occurred more than once a month. In fact at that time there was hardly a time that they were not drinking.

He treated my sisters the same way. In order to escape his brutality, I begged relatives to take me out of that house to live with them when I was nine years old, and got married when I was fifteen.

Velma Gore and Mildred Waterfield never left our parents. They raised their families in the same compound where my parents' lived. I have always been concerned that their children might be exposed and subjected to the same abuse I suffered while growing up.

When I found out in 1983 that Wendy had been sexually assaulted by Frederick Waterfield when she was in the ninth grade, my fears were confirmed. The cycle of family members abusing each other had been passed down another generation. Because members of my family have always been reluctant to admit that they have been abused, even to the people they are closest to, the full extent to which children from that generation may have been abused may never be known.

Even before David was arrested for the murder of Lynn Elliott, I felt that he was suffering from serious mental problems and needed psychological help. I believe that childhood fevers, drugs and alcohol and a

personality that let others control contributed greatly to these problems.

On several occasions, David's mother, Velma, told me how when David was very young he suffered from prolonged high fevers and convulsions. Velma also told me that David often saw strange lights at night in his room when he was a little boy which he said came from flying saucers.

David was a very timid, quiet child. When he and Freddie were together, David was the follower. Freddie was the more dominant, forceful personality.

For many years, David worked in the citrus groves around Vero Beach. At the groves, I know that he was constantly exposed to chemical sprays and pesticides and I was worried about the effect these chemicals might be having on him.

When David's marriage started to go bad, his personality changed. He started to drink heavily and use drugs.

David's second divorce devastated him. His wife Donna won custody of Michael and Jonathan, David's sons, and she was preventing him from even seeing them. They were the most important things in his life, and the fact that he was losing them was destroying him. He once wrote to me that he would "rather go to his grave than not be able to see his children."

(Affidavit of Dorothy Stokes, PC 914-17).

My name is Wendy Bowling and I am David Gore's sister. I am three years younger than David and I am his only sibling. I currently live in Pickens, South Carolina with my husband Bill, and our two children, Billy who is seven, and Tamara who is three.

On July 26, 1983, Bill and I were living in Vero Beach, Florida. I received a call that afternoon from Mildred Waterfield, my aunt and the mother of Frederick Waterfield, informing me that there were people from the sheriff's office at my parents' house, that I should call David's attorney and come right over. I contacted Cal Brown, the attorney who was handling David's divorce proceedings, and then Bill and me drove out to our parents' house.

When I got there, I saw that deputies from the sheriff's office were already there, including my uncle, Lonnie Gore. Lonnie told me, "David has flipped. David's not David, you don't want to see

him," and he convinced me to go to my grandparents' house next door. I never saw David in person that day.

I did, however, see pictures of David right after his arrest on television and in the newspaper. When I saw those pictures, I said "That isn't David." I had never seen his eyes look that way before. It was like looking into the eyes of a stranger.

I now believe that the strange appearance of David's eyes were the result of his intoxication. After attending his trial, there is no doubt in my mind that David was being affected by drugs or alcohol the day of his arrest. In the days that followed his arrest I had seen evidence that he had been using drugs and alcohol right before his arrest. My husband had found a half filled gallon of vodka in David's room. He also found some pills which were clear capsules with blue and white beads. I flushed these pills down the toilet in order to ensure that my two-and-half year old son would not accidentally take some. I also noticed an asprian-bottle with a clear yellowish paste in it.

When I heard the tape of David's confession being played at the trial, I knew for certain that he was drunk at the time. David was much too talkative during his interview with the detectives for him to have been sober. David has been an exceptionally quiet person his entire life. He has difficulty carrying on a conversation. He's very shy and withdrawn. The only time I can remember him being talkative was when he was drinking.

While David was never talkative while he was growing up, there were times when he would become extremely quiet. He would get into these moods where he didn't want to talk to you and you were not going to ask him any questions. He just wanted to be by himself. I never knew what caused him to go into these moods, and I never asked him. I just assumed he was being David.

Growing up, I used to envy some of my friends relationships with their siblings, because David and I never were close. David never opened up to me or showed me any signs of affection. He never told me that he loved me or put his arms around me. I have always had a feeling that David has been jealous of me because I was much closer to our parents than he was. I also believe he was jealous of the fact that I had such a successful relationship with Bill. I think David was frustrated that he could not seem to have a real close relationship with anyone because he lacked the social skills.

David was very upset when he split up with his wife Donna for the second time in 1981. He was particularly depressed by the fact that he lost his kids in the custody battle, and Donna was preventing him from seeing them. Michael and Jonathan, David's sons, were the most important things in the entire world to David.

One time I walked into my parents home while David and my mom were discussing the fact that Donna was preventing David from seeing his sons. David was crying and yelling, "You just don't understand!" It was the first time I had ever seen David cry or raise his voice to our parents. It was then that I began to realize the extent to which Donna had destroyed David.

I saw David the weekend before he was arrested for the murder of Lynn Elliott. His behavior at that time troubled me. On Saturday, Bill, my son Billy, and myself went over to my parents house so Bill could work on some cars. David was there and he was acting very strange and seemed very depressed. He was acting nervous. He was even more withdrawn and quiet than usual.

David wouldn't respond to any of us, even Billy. Billy would try to play with him, but he didn't want to have anything to do with Billy. This upset me, because David and Billy were very close and David had never refused to talk or play with him before. That night I talked with my mother who was in North Carolina at the time, and I told her that David was not acting right. The next night, David came over to our house for supper, and he was acting in the same way as he had Saturday.

The next time I talked with David was the day he was arrested. We talked on the phone that morning, and he was acting completely different than he had been that weekend. He was very talkative and was asking about all sorts of things that he would never talk about normally. From the way that David was talking, I knew that he had to have been drinking.

Shortly after his arrest, David told me that when he came out of the house and surrendered, he was considering ending his life right then and there. David had taken law enforcement courses and had served as an auxiliary deputy for the Indian River County Sheriff's Office. He knew that if he lowered his arms he would have been shot and killed immediately. David said he was seriously considering putting his arms down and making a run for it so he we would be shot and killed.

David also told me that while the crime was happening, he felt like he was standing outside of his body. It was like he was watching somebody else. He also told me that at times he could feel himself being tainted by someone else. It was as if someone was taking over his personality. And he had been trying to hide what was happening from our parents.

David also had illusions as a child. Sometime when he was between the ages of 10 and 13, he told my parents and me that he was seeing many different colored lights coming through the window in his room. David told us that they were coming from flying saucers. I never saw any of these lights even though the window in my room was facing the same side of the house as the window in David's room.

David and Frederick Waterfield were very close when they were growing up. Freddy was David's idol. Freddy was very domineering. I could tell from the times I played with the two of them that Freddy was able to get David to do exactly what Freddy wanted him to do.

When I was in ninth grade, Freddy sexually assaulted me. I had just left my bedroom and was walking towards the family room, when Freddy grabbed me from behind and pulled me into my bedroom. David was with him. David held me down while Freddy took off my pants and penetrated my vagina with his fingers. As this was going on, I was screaming for them to stop and threatening to tell on them. Freddy was instigating and directing the entire incident. I had the feeling this was not the first time Freddy had done something like this, and now he was teaching David how to do it too. After Freddy had penetrated my vagina with his fingers, David said "No, that's my sister," and pulled him away from me.

. . .

While this was the first time Freddy had sexually assaulted me, it was not the first time that I had seen him make sexual assaults at someone. When Freddy was ten or eleven, I spotted him assaulting a friend of mine, who was eight at the time.

(Affidavit of Wendy Bowling, PC 919-24).

My name is Bill Bowling and I live in Pickens, South Carolina, where I work as a machinist at Southeastern Industrial Services. I am married to Wendy Bowling, who is David Gore's sister. I have known David for almost twenty years.

On July 26, 1983, Wendy and I were living in Vero Beach, Florida. That afternoon, Wendy got a call from Mildred Waterfield, her aunt and the mother of Frederick Waterfield, telling her that cars from the sheriff's office were at her parents house and she should come right over. When we got there, Wendy was sent to her grandfather's house next door by her uncle, Lonnie Gore, a deputy with the Indian River County Sheriff's Office.

After Wendy went to her grandfather's house, Dorothy Stokes (Wendy and David's aunt), Mildred Waterfield and myself all pleaded with David to give himself up. After I talked with him through a megaphone, David surrendered to the sheriff's deputies.

David was instructed to keep his hands up as he left the house. He later told me that he was considering putting his hands down and making a run for it, so that that he would be shot and killed right then and there.

David was not the only person in the family who wanted to end his life because of what happened that day. When David was arrested, his parents were vacationing in North Carolina. I have been told that when David's father, Alva Gore, told David's mother, Velma Gore, that David had been arrested for murder, they were driving back to their cabin. When Velma heard about David's arrest, she tried to jump out of the car which was going over sixty miles per hour through winding mountain roads.

After the police were through searching my in-law's house, I found a gallon of vodka in David's room that was half empty. I also found a receipt from Lenny's Lounge for the vodka which indicated that it had been bought the day before David had been arrested. I also found a bunch of pills laying around the dresser in David's room. I think they were amphetimines.

Even before July, 1983 I thought David had some serious mental problems and needed professional help. He was so quiet, and he always seemed uncomfortable and ackward around people. Wendy and David's parents are not very talkative either, but David is exceptionally quiet. If you tried to start a conversation with him, he would cut you off. I often tried to talk with him, either when we were alone or with other people, but he didn't seem to know how to carry on a regular conversation. I can't really explain it, but David just wasn't like other people.

The only time I ever saw David really talk was

when he was drinking. He would have just one drink and five or ten minutes later he was a completely different person. When David wasn't drinking, he would answer questions with just a "yes" or "no," and would never begin a conversation himself. When he's had a drink, he would be talking your ear off. He was more aggressive when he was drunk, and he would act in bizarre ways and do crazy things. When he was drinking he wouldn't even consider what the results of his actions might be.

Because I know David so well and have known him for so long, I knew he was drunk the day he was arrested and talked to the deputies. The only time he would talk loosely like that was when he was drunk. I didn't need to find the gallon of vodka in his room to know that he was high as a kite on July 26, 1983. I've never understood why the bottle of vodka and pills were never mentioned by the state, and why David wasn't tested for the alcohol and drugs in his blood.

People did not think very much of David, and he realized this. The people who meant most to David were constantly belittling him, including his parents. Donna, David's wife was constantly putting him down and making him feel lousy. Even though David wasn't somebody I looked up to or wanted to be like, I always felt bad when people would mistreat him. It's just not right to be mean to people who are slow and different. David really didn't have friends. People would rather make fun of him than be friendly to him. David ended up spending a lot of time with his cousin, Frederick Waterfield, for this reason.

I've always thought of Freddy Waterfield as the kind of person who would land you in some trouble pretty quick, but David worshipped Freddy. The two of them were always together. David would follow Freddy anywhere and do anything that Freddy wanted him to.

The power that Freddy had over David really became apparent to me when I saw the way the two of them interacted during fishing trips. There was nothing that David loved as much as fishing, but he would often quit fishing and eagerly go off with Freddy just because Freddy wanted him to.

Freddy gave David a sense of importance. While most people did not think much of David, Freddy was a member of the football team, did well academically and was popular. It gave David a real sense of pride that someone like Freddy would pay that much attention to him.

It doesn't take much to influence David. He's a lot like Wendy in that way. They're both easily led. David isn't capable of doing alot of thinking on his own and he doesn't really think about what the consequences of his actions are going to be.

David was also handicapped because of how poor his family was when he was growing up. Maybe if they'd had the money or the education to realize how seriously David needed help, David wouldn't be where he is today. The reality is that up until David was in his middle teenage years the family lived in a small, wooden house built by Alva Gore's own hands. My father-in-law has told me how tight money was back then, and how he would feed his family by hunting. He has told me that when one of the children got sick or the family needed anything besides the very bare necessities, he would catch frogs and earn what he could selling them. They lived a very hand-to-mouth kind of existence. Though I wish David could have been properly cared for and seen to, I understand how difficult live was for the whole Gore family.

(Affidavit of William Bowling, PC 927-30).

My name is Jonathan Broun and I am an investigator with the Office of the Capital Collateral Representative.

On February 23, 1988 I talked with Lonnie Gore, who is David Gore's uncle. Lonnie Gore is presently a deputy with the Indian River Sheriff's Office.

Lonnie Gore was one of the officers from the Sheriff's Office who was present when David Gore was arrested for the murder of Lynn Elliott. Lonnie, who has known David since David was born, said that the David Gore he saw that day "was not David, at least not the David I had always known."

Lonnie said he was struck by the appearance of David's eyes that day. He had never seen his eyes look the way they did that day. They had a glassy, wild look to them. Lonnie believes that the strange appearance of David's eyes could have been caused by drugs or alcohol.

Before David was arrested, Lonnie had often times seen Frederick Waterfield and David together. During these times, it appeared to Lonnie that Freddy was the leader and David would be his follower.

Mr. Gore was willing to sign an affidavit to these facts, but there was no notary public at the place of

his work, and he was unable to leave his place of work to go to a notary public.

(Affidavit of Jonathan Broun, PC 933-34).

My name is the Rev. Fritz Bowman and I am a pastor in the prison ministries in Florida. When David Gore was incarcerated in the Indian River County Jail waiting to be tried for the murder of Lynn Elliott, I met with, counseled and offered spiritual guidance to him on several occasions.

While I was counseling David, he told me that the day he had been arrested he had been using both drugs and alcohol and that these substances had caused him to lose his mind.

David also told me that he feared Frederick Waterfield. David said that throughout his life Freddy had been capable of making him do anything.

(Affidavit of Rev. Fritz Bowman, PC 936).

The District Court and Court of Appeals ruled that the eighth amendment error involved in the state trial court's exclusion of such evidence could not be deemed harmless beyond a reasonable doubt. Given "the circumstances of this particular trial," Gore v. Dugger, 933 F.2d 904, 905 (11th Cir. 1991), there can be little doubt regarding the critical importance of this evidence and the fact that the jury should have been allowed to learn of it. Intoxication is obviously a critical factor counseling for a sentence less than death. Additionally, as recognized by Florida law, a history of alcohol and/or drug problems is strictly mitigating, regardless of whether or not it directly relates to the offense. See Waterhouse v. Dugger, 522 So. 2d 341 (Fla. 1988)("Waterhouse proffered evidence that he suffered from alcoholism and was under the influence of alcohol on the night of the murder.... The jurors should have been allowed to consider these factors in mitigation"); Fead v. State,

512 So. 2d 176 (Fla. 1987)(court has "held improper an override where, among other mitigating factors, there was some 'inconclusive evidence that [defendant] had taken drugs on the night of the murder', along with 'stronger' evidence of a drug abuse problem"); Barbera v. State, 505 So. 2d 413, 414 (Fla. 1987)(intoxication and drug dependency may be used to mitigate recommended sentence); Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986)("history of drug abuse" one factor rendering jury override improper); Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985)(history of drug abuse among factors rendering jury override improper); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985)(override improper due in part to defendant's "drinking problems" and history of alcoholism, notwithstanding defendant's testimony that he was "cold sober" on night of crime). See also Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) (in banc) (possible intoxication at time of offense is mitigating).

The evidence excluded by the sentencing court would have established that David Gore had severe problems with alcohol and substance abuse, that those problems had significant effects on his personality and behavior, and that he was likely under the effects of intoxicants at the time of the offense. Moreover, the excluded evidence would have informed the jury of what the State already knew: that codefendant Freddy Waterfield had an "overpowering effect," a "duress and emotional effect" over David Gore, and especially so when David drank. See section B(2), infra. Waterfield had had such an influence on Mr. Gore for a long time, and "where they were working together as a team, the

man who was most responsible ... was Fred Waterfield." State v. Waterfield (prosecutor's argument).

Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Hitchcock v. Dugger, 481 U.S. 393 (1978), teach that evidence relating to the defendant's character and background and/or the circumstances of the offense must be considered in order for the capital sentencing determination to be reliable, meaningful, and individualized. The trial court nonetheless refused to allow the evidence in Mr. Gore's case.

The parties, the District Court, and the Court of Appeals are in agreement that the trial court's ruling here violated established principles of eighth amendment jurisprudence.

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider [or be precluded from considering], as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed the jury to disregard the mitigating evidence [Mr. Gore] proffered on his behalf. The sentencer, and the [appellate court] on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982)(footnote omitted) (emphasis in original). By refusing to admit the evidence, the court prohibited the jury from even hearing it, much less from considering it. The eighth amendment error here is thus more egregious, and more plain, than the errors at issue in jury instruction cases such as Hitchcock v. Dugger, 481 U.S. 393 (1978).

Mr. Gore's sentencing jurors were not allowed to hear or consider significant mitigating evidence. The Florida Supreme

Court itself has explained that,

> [T]he standards imposed by Lockett bind both the judge and the jury under our law.... If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.

Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987). And the mitigating facts here were credible and reliable, as the District Court found.

2. Codefendant Domination

During the sentencing proceeding, defense counsel also tried to present evidence about the relationship between David Gore and the co-defendant Frederick Waterfield, and specifically about Waterfield's domination of Mr. Gore in this case (See, e.g., R. 3085). The State objected. The judge suggested that defense counsel was "trying to get in indirectly what he could not get in directly" (R. 3092). The trial court then ruled:

> [T]o permit you [now] to bring in evidence that this defendant acted under the substantial domination of another person in the Court's opinion is not going to the character of the defendant, but going into another mitigating factor. In the Court's opinion it's highly prejudicial to the State of Florida.

(R. 3093)(emphasis supplied). Defense counsel insisted that he was attempting to prove mitigating circumstances relating to the codefendant's substantial domination of Mr. Gore at times approximate to the offense (R. 3093-94), circumstances relating to the history of Waterfield's dominance of and influence over Mr. Gore, and the inherently passive and dependent "character" of Mr. Gore. The trial judge nevertheless sustained the State's objection.

Defense counsel then sought to introduce evidence of Mr. Gore's difficult background. In accordance with the restrictive view imposed earlier, the trial court once again precluded the inquiry. For example:

[Direct Examination by Defense Counsel Long]

Q Did David finish high school?

A He dropped out about -- well, a few months before his graduation.

Q Why did that happen, do you know?

THE COURT: Now, Mr. Long --

MR. STONE [prosecutor]: Your Honor --

THE COURT: -- I believe you must proceed along the rulings of the Court. We're dealing with the character of the defendant, David Alan Gore, consistent with my ruling.

MR. STONE: Your Honor --

THE COURT: As to why he dropped out of high school, the objection is sustained.

MR. LONG [defense counsel]: Your Honor, may we approach the bench?

(The following bench conference was held:)

THE COURT: It was my understanding that you stated the reason he dropped out of high school was because of Waterfield. That was my understanding.

MR. LONG: Right, but that's not necessarily going to show domination.

THE COURT: What other purpose would it be for?

MR. STONE: That doesn't go to the element of the defendant's character.

THE COURT: Why would it come out? What other purpose would it be?

MR. STONE: You know, I --

MR. LONG: I'm trying to avoid the domination issue, but get into the history of his life.

* * *

THE COURT: Why he dropped out of high school and the relationship between him and Waterfield and so forth, unless it goes to the particular time of the offense, the objection will be sustained.

MR. LONG: Okay. Your Honor, I do believe that your ruling violates the rules set forth in Lockett versus Ohio.

THE COURT: I've already ruled, gentlemen. I want to be consistent with my ruling.

(R. 3098-3100).

Mr. Gore presented in state court post-conviction proceedings the mitigating evidence relating to the relationship between Waterfield and Mr. Gore and Mr. Gore's background and character, evidence which would have been presented to the sentencing jury by his trial counsel had the court not precluded its introduction. Numerous family members and friends would have then substantiated (and now substantiate) Waterfield's complete domination of Mr. Gore and Mr. Gore's particular susceptibility to such influence. Mr. Gore's mother would have testified about the relationship:

> If David was really close to anybody growing up, it was Frederick Waterfield. However, his relationship with Freddy has always greatly troubled me. Freddy was David's idol, and he could get David to do anything he wanted him to. When David was with Freddy, he would behave in a manner completely different than when he was around anybody else. I was so concerned about Freddy and David's relationship that I was constantly making efforts to separate the two of them.
>
> My attempts at separating them didn't work. Throughout their entire lives, Freddy and David were constant companions. Even after David married Donna, he and Freddy were always together. I was always afraid that with the type of influence that Freddy had

over David, he was going to get David into trouble. (Affidavit of Velma Gore, PC 909-10). Mrs. Gore also testified at the state court post-conviction hearing:

Q Who did he hang around with in 1983?

A Freddy Waterfield.

Q Did he hang around anybody else to your recollection?

A Not to my knowledge, I can't, no.

Q Did he also work for Freddy?

A Yes.

Q Would he go out with Freddy in the evenings?

A Yes, quite a few times.

Q Did you have an occasion in 1983 to be around Freddy Waterfield?

A Yes.

Q Could you tell us what kind of personality Freddy had?

A Well, Fred was always a, kind of a nervous, talkative, happy-go-lucky type of person. He was never lost for words and in a group he always kind of stood out.

Q Popular?

A Yes.

Q Did he have a strong personality?

A Yes.

Q Did that ever give you any concern when Freddy was around David?

A Well, usually whenever David was with Freddy his actions would kind of change, too, he would tend to be more like Freddy than himself, you know, he would be more like you say he was trying to be like Freddy.

Q Was David the follower?

. . . .

A I'm sorry, David was a follower. He seemed like he would go along with most anything Freddy would suggest or do. It seemed like he would be willing to.

Q Is it fair to say that Freddy dominated David?

A Yes.

(Testimony of Velma Gore, PC 534-35).

Mr. Gore's father also testified regarding his son's relationship with Waterfield:

Q Was Freddy like David, Mr. Gore?

A No. Freddy wasn't just exactly like David. I think Freddy was probably more, I guess more smarter and more ambitious than David.

Q More outgoing?

A More outgoing, yes, than David was. To that sense of the word I believe there was quite bit of difference between the two of them.

. . . .

Q Is it fair to say that Freddy had a stronger personality than David?

A I think he did. I think Freddy had a little stronger personality.

Q Do you remember a time when the boys got into trouble, both Freddy and David, and they ran away?

A I remember the time, yes.

Q Do you recall where they ran to?

A They went up to Detroit, Michigan.

Q Did David have any friends in Michigan?

A Who had friends in Michigan?

Q Freddy Waterfield had friends in Michigan.

A So David went with him when he ray away?

A David went with him, yes, sir.

Q Is it fair to say that Freddy could talk David into things like that?

A Yeah, I believe, yes, I believe he could talk David into doing things.

(Testimony of Alva Gore, PC 461-62).

Q Yes. Is it your testimony today that Freddy Waterfield influenced David your son?

A Well, I believe to a certain, to quite a bit of extent he did influence David on a lot of things.

Q Led your son?

A Sir?

Q Led your son?

A I didn't understand you.

Q Did Freddy Waterfield lead your son?

A He was, he led him quite a bit, yes, I figure that he was kind of a leader.

. . . .

. . . it was my opinion that Freddy is smarter and David could be led by Freddy into doing whatever they wanted to do.

Q Okay. Is it fair to say in 1983 that because Freddy was smarter, had a stronger personality, that Freddy dominated David?

A I would say so, yes, sir.

(PC 473-74).

Mr. Gore's sister would have testified similarly from her own observations of and experiences with the two men:

> . . . David and Frederick Waterfield were very close when they were growing up. Freddy was David's idol. Freddy was very domineering. I could tell from the times I played with the two of them that Freddy was able to get David to do exactly what Freddy wanted him to do.

When I was in ninth grade, Freddy sexually assaulted me. I had just left my bedroom and was walking towards the family room, when Freddy grabbed me from behind and pulled me into my bedroom. David was with him. David held me down while Freddy took off my pants and penetrated my vagina with his fingers. As this was going on, I was screaming for them to stop and threatening to tell on them. Freddy was instigating and directing the entire incident. I had the feeling this was not the first time Freddy had done something like this, and now he was teaching David how to do it too. After Freddy had penetrated my vagina with his fingers, David said "No, that's my sister," and pulled him away from me. . .

(Affidavit of Wendy Bowling, PC 923-24).

Mrs. Bowling's husband could also have testified:

. . . People did not think very much of David, and he realized this. The people who meant most to David were constantly belittling him, including his parents. Donna, David's wife was constantly putting him down and making him feel lousy. Even though David wasn't somebody I looked up to or wanted to be like, I always felt bad when people would mistreat him. It's just not right to be mean to people who are slow and different. David really didn't have friends. People would rather make fun of him than be friendly to him. David ended up spending a lot of time with his cousin, Frederick Waterfield, for this reason.

I've always thought of Freddy Waterfield as the kind of person who would land you in some trouble pretty quick, but David worshipped Freddy. The two of them were always together. David would follow Freddy anywhere and do anything that Freddy wanted him to.

The power that Freddy had over David really became apparent to me when I saw the way the two of them interacted during fishing trips. There was nothing that David loved as much as fishing, but he would often quit fishing and eagerly go off with Freddy just because Freddy wanted him to.

Freddy gave David a sense of importance. While most people did not think much of David, Freddy was a member of the football team, did well academically and was popular. It gave David a real sense of pride that someone like Freddy would pay that much attention to him.

It doesn't take much to influence David. He's a lot like Wendy in that way. They're both easily led.

> David isn't capable of doing alot of thinking on his own and he doesn't really think about what the consequences of his actions are going to be.

(Affidavit of William Bowling, PC 929-30). Mr. Bowling testified at the post-conviction hearing in the state court, as he would have testified at the sentencing phase of Mr. Gore's trial:

> Q Now, did David have a lot of friends when he was in school?
>
> A I don't know of any but the one, his cousin Freddy Waterfield.
>
> Q Did he have any friends after -- well, did David finish school?
>
> A No, as I understand he quit and then went back and got his GED at his mother's request.
>
> Q Did David have any friends that you know of when he had quit school other than Freddy?
>
> A No. Every time I ever saw him he was either sitting around with Freddy or riding around with him in his truck or working with him down at that 4 x 4 shop that they had together.
>
> Q Could you tell me what Freddy Waterfield was like in school, what his personality was like?
>
> A I was about two years behind him or a year behind him, something along that time. I'm not sure of his age. But from what I could tell of him he was some kind of a football star, many people looked up to him for his athletic abilities and his open, outgoing personality. I didn't get to know him much. I felt I was being put down when I was around them so I didn't try to get to know him. I thought me being younger they didn't want to be around me. But he seemed like he was a very outgoing person.
>
> Many of the people seemed to like him. Many of the ladies that I had known from the school said they knew him and thought he was a very easy going guy.
>
> Q So he was kind of a ladies man, at least?
>
> Q I would think so.
>
> Q Kind of a bid man on campus?

A Yes.

Q Was David like that? Was David popular in school?

A No, in fact, since all this has happened most of the people I spoke to can't remember him. They went to school with him but can't remember him. They looked in their yearbooks and they still can't remember. They can't remember him, not until they seen him on TV.

Q Why do you think that was?

A Keeping to himself, not getting to know people, he just went to school, did what he had to do and that was it. Very quiet. Not really wanting to make any extra friends, I would believe.

Q What do you think David got out of being Freddy's companion? Why do you think David hung around Freddy?

A I believe that maybe in his case he would feel a little more, how should I say, it's like if you hang around with somebody that somebody looks up to that maybe they will think a little more of you. Maybe they will start associating with you, thinking you're real nice, too, and maybe make a lot more friends that way. That's what I would feel it would be more like in his case. That by being around him maybe more people would like him. Maybe some of it would rub off, the friends and getting to know other people.

Q So to try and make up maybe for some of David's deficits, personality deficits?

A Yes.

(Testimony of William Bowling, PC 393-95).

A Yes, him and Freddy were real close. If you ever saw one, the other one would most of the time be with them. Even when they came to the hunting camp, a lot of times I would see him and Freddy coming together. Even though we were having a family get together they would get in, come in Freddy's truck, and if the fish weren't biting Freddy was ready to do something and say, "David let's go do something else," and he would put the pole away. And that's not like David. He likes fishing. Normally, he likes to fish until the fish are gone. He would fish all day if he can.

Q Did that strike you as strange, the influence

that Freddy seemed to have on David?

A Yes, I know how much he likes to go down to that hunting camp to go fishing and hunting and suddenly Freddy saying, Let's go, he was ready to go. It seems to me, he found something he enjoys doing or getting away rather than doing this, his favorite past time, I believed.

Q The occasions you saw David and Freddy together, did Freddy always have that kind of dominating influence over David?

A Yes, it seemed like when they were together that David would more or less be like tagging along or a shadow for him. It seemed like he really thought a lot of Freddy like many people did I guess. But it seemed like he was his idol or something. He wanted to be like Freddy; maybe he thought by hanging around him he would be more like him and people would like him better.

Q That started in high school?

A Yes, I think so. They grew up together from very young ages, being cousins of course, and they were around each other a lot.

Q That continued on until 1983?

A Yes.

Q Shortly up until this offense was committed?

A Yeah, they were still working together and hanging around together, of course, taking off together in vehicles, going out on the town and such together.

Q After they finished working the day together then David would go out with Freddy at night as well?

A Yes, usually they would find something to do together in the evenings.

Q Would you say that David was hanging out pretty much exclusively with Freddy during this period of time?

A I believe Freddy was about the only close friend that he could do anything with. He might have acquaintances other than Freddy but Freddy seemed to be the only one that he wanted to be with, to do anything with.

(PC 405-07).

Mr. Gore's uncle would also have testified regarding the relationship between his nephew and Freddy Waterfield:

> Q Could you tell us how Freddy Waterfield struck you during that time, what kind of person he was?
>
> A Well, I wish I could say it.
>
> Q You can go ahead and say it.
>
> A One of the biggest liars that ever walked the face of the earth.
>
> . . . .
>
> Q Can you tell us what kind of a person Freddy was? Can you explain to the Judge what you thought of Freddy based on these meetings?
>
> Q You're putting this hard on me.
>
> Q Excuse me.
>
> A Honest opinion, I wouldn't trust him as far as I could see him. When he was at my place, Mr. Vocelle, I'd have to watch him. Because he had his mouth engaged before he had his brain engaged or vice versa, I don't know. But like he asked, no, I wouldn't trust him at all and he led David around like a -- from every time I seen them, he was leading David around like a little puppy dog, you know.
>
> Q Okay, Mr. Gore. Was Freddy outgoing?
>
> A Very, yes.
>
> Q Was he talkative?
>
> A You couldn't get a word in edgewise.
>
> Q Did Freddy have a personality, a forceful personality, someone that would go out and talk to people, strike up conversations actually?
>
> A He would have made a Philadelphia lawyer.
>
> Q Okay.
>
> A If he --

Q Go ahead, you were going to say something?

A If he would have had the chance, if he would have had the education, college, he would have made one of the greatest Philadelphia lawyers, Matlock wouldn't have stood a Chinaman's chance with him, I guarantee you that.

Q I take it then that Freddy was brighter than David was?

A He was smart.

Q Smarter than David?

A Oh, by all means, yes, he was, like I say, he was very intelligent.

Q And not as, more than intelligent than David; is that right?

A Rephrase that, I didn't hear you.

Q Freddy was smarter than David was?

A Yes, sir.

Q That was one of the reasons that Freddy could lead David around; is that right?

A Yes. Yes.

(Testimony of Joseph Gore, PC 363-65).

3. The Parties' Positions Below

Before the District Court and then in the Court of Appeals the State did not dispute that all of this evidence was mitigating in its nature. Neither did the State contest the veracity of the evidence. The District Court, and subsequently the Court of Appeals in its affirmance, found that the evidence was reliable, credible, and that it established mitigating factors. The Court of Appeals ruled that "under the circumstances of this particular trial," the exclusion of such mitigating evidence from the jury's consideration could not be

deemed harmless. Gore v. Dugger, 933 F.2d 904, 905 (11th Cir. 1991).

C. This Court's Standard of Review and Its Application in the Eleventh Circuit

In light of the substantial nature of the mitigation in this case, Mr. Gore submitted to the District Court and Court of Appeals that it could not be "confidently conclud[ed]" that the error was harmless beyond a reasonable doubt. See Skipper v. South Carolina, 476 U.S. 1, 8 (1976). The eighth amendment requires that capital sentencing proceedings be individualized and reliable and thus that capital sentences "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604 (emphasis in original). This requirement is necessary in order to avoid "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Id. at 605. This Court has cautioned that "the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer," Satterwhite v. Texas, 486 U.S. 249, 108 S. Ct. 1792, 1798 (1988), and thus that review of errors in such proceedings requires the strict application of the standard that the State must prove harmlessness beyond a reasonable doubt. Satterwhite; Chapman v. California, 386 U.S. 18 (1967).

The Eleventh Circuit Court of Appeals has consistently applied the Chapman standard to the review of cases involving

Hitchcock error, and this Court has never indicated that the Court of Appeals has been acting improperly in applying this Court's harmless error standard. Most recently this Court denied certiorari review in Singletary v. Jackson 111 S.Ct. ___ (1991), previous history, 931 F.2d 712 (11th Cir. 1991), and Singletary v. Booker, 111 S.Ct. ___ (1991), previous history, Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991), each involving the State's requests for certiorari review in cases where the Court of Appeals ruled that the errors resulting from the exclusion of mitigating evidence could not be deemed harmless beyond a reasonable doubt under Chapman.

The Eleventh Circuit has also found Hitchcock errors to be harmless. See Tafero v. Dugger, 873 F.2d 249, 252 (11th Cir. 1989), cert. denied, 110 S.Ct. 1834 (1990); Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), cert. denied, 110 S.Ct. 1834 (1990); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987), cert. denied, 485 U.S. 982 (1988). It is in cases like this one, where review of the totality of the circumstances of the particular case, Gore, 933 F.2d at 905, discloses that the error had an effect on the verdict, that the Court of Appeals has found that the State has not established harmlessness beyond a reasonable doubt. See Delap v. Dugger, 890 F.2d 285, 306 n.23 (11th Cir. 1989) ("The presence of substantial nonstatutory mitigating evidence in this case ... is sufficient to render the Hitchcock error not harmless beyond a reasonable doubt"), cert. denied, 110 S.Ct. 2628 (1990). See also Booker, 922 F.2d 633 (11th Cir. 1991), cert. denied, 111 S.Ct. ___ (1991); Jackson, 931 F.2d 712 (11th Cir. 1991), cert.

denied 111 S.Ct. ___ (1991).

This Court has not previously reversed the Eleventh Circuit Court of Appeals' application of the Skipper/Satterwhite/Chapman standard in either category of cases. See Jackson, 111 S.Ct. ___ (denying certiorari); Booker, 111 S.Ct. ___ (denying certiorari); Delap, 110 S.Ct. 2628 (denying certiorari); Tafero, 110 S.Ct. 1834 (denying certiorari); Clark, 485 U.S. 982 (denying certiorari). The mitigating evidence in Mr. Gore's case is reliable, credible, and valid; it would have been significant to the jury's determination as to the appropriate penalty; it would have affected the decision of a reasonable jury; but the jury here was not allowed to hear it.

ARGUMENT

THIS CASE PRESENTS NO CONTROVERSY WARRANTING THE GRANTING OF THE STATE'S PETITION

The Petitioner agrees (petition, p. 4) that the state trial court, on the basis of an objection by the trial prosecutor, did not allow defense counsel to present to the jury the mitigating evidence which he had developed on Mr. Gore's behalf. Mr. Gore presented an issue relating to the trial court's ruling on direct appeal to the Florida Supreme Court, but the Court sustained the conviction and death sentence without addressing the trial court's error. See Gore v. State, 475 So.2d 1205 (Fla. 1985).[2]

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[2] The Petitioner agrees that the issue was presented on direct appeal (petition, p. 4) although stating that the claim was based on "Florida law." Mr. Gore notes that the claim raised on direct appeal was not limited to a state law challenge to the trial court's error, as the state supreme court's subsequent opinion during post-conviction proceedings indicates. See Gore v. Dugger, 532 So.2d 1048 (Fla. 1988).

After the issuance of Hitchcock v. Dugger by this Court in 1987, and given the Florida Supreme Court's holdings that claims relating to the exclusion of mitigating evidence from consideration in capital sentencing proceedings are cognizable in post-conviction proceedings in the Florida courts, see, e.g., Hall v. State, 541 So.2d 1125, 1126 (Fla. 1989) (listing a number of these holdings), Mr. Gore requested that the state courts address the errors relating to the trial court's ruling in his motion for post-conviction relief filed pursuant to Fla. R. Crim. P. 3.850 and state court petition for writ of habeas corpus. The Florida Supreme Court issued a consolidated opinion on the two actions. Gore v. Dugger, 532 So.2d 1048 (Fla. 1988). As the opinion demonstrates, the state supreme court recognized that "Gore should have been permitted to introduce such evidence," id. at 1050, but improperly analyzed the claim. Viewing the claim as one involving "ineffective assistance of counsel," the Court denied relief by holding that it did not believe that but for the error the result of the proceedings would have been different. Id. Proper review of the constitutional error, however, required the Florida Supreme Court to place on the State -- the beneficiary of the error -- the burden of demonstrating harmlessness beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967); Satterwhite v. Texas, 486 U.S. 249 (1988); Skipper v. South Carolina, 476 U.S. 1 (1986). The Florida Supreme Court did not apply the standard of harmlessness beyond a reasonable doubt to this case. As the opinions of the District Court and Court of Appeals would subsequently

demonstrate, the state court's failure to apply the proper standard of review resulted in an erroneous disposition.

Mr. Gore's petition for writ of habeas corpus was heard by the Chief District Judge for the Middle District of Florida, William Terrell Hodges. Chief Judge Hodges' ruling is reported as Gore v. Dugger, 763 F.Supp. 1110 (M.D.Fla. 1989). Before the District Court, the Attorney General agreed that the state trial court's rulings excluding relevant mitigating evidence from the jury's consideration were erroneous and that Lockett and Hitchcock were violated. The State Attorney General did not argue that the proffered mitigating evidence was not credible, nor that it was unreliable, nor that it lacked mitigating value. Chief Judge Hodges considered the facts of this case and the value of the mitigation and, after analyzing precedent from this Court and the Eleventh Circuit Court of Appeals, granted habeas corpus relief as to the death sentence finding that the error could not be found to be harmless beyond a reasonable doubt.

Chief Judge Hodges, Respondent notes, was the District Court Judge in Clark v. Dugger, 834 F.2d 1501 (11th Cir. 1987), a case in which Hitchcock error was found harmless beyond a reasonable doubt. In the instant case, as well as in previous cases in which the Florida Attorney General has sought from this Court a reversal of rulings by the Eleventh Circuit which found Hitchcock errors not to be harmless beyond a reasonable doubt,[3] the Attorney General has relied on Clark in support of its arguments.

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[3] See Singletary v. Booker, 111 S.Ct. ___ (1991); Singletary v. Jackson, 111 S.Ct. ___ (1991).

The fact that the same Chief District Judge rendered the rulings in Clark (finding the error harmless) and Gore (finding that the error was not harmless) speaks volumes to the propriety of the District Court's ruling in this case -- a ruling rendered by a Chief Judge experienced in addressing claims of Hitchcock error in Florida cases and in enforcing a standard of review which denies relief to those petitioners in whose cases the error can be deemed harmless beyond a reasonable doubt.

The State Attorney General appealed Chief Judge Hodges' ruling to the Eleventh Circuit Court of Appeals. The Court of Appeals' panel was comprised on Chief Judge Tjoflat, Judge Fay, and Judge Johnson. The opinion affirming Chief Judge Hodges' ruling was unanimous. Gore v. Dugger, 933 F.2d 904 (11th Cir. 1991). The full court thereafter denied the State's petition for in banc rehearing with no member of the Court suggesting that the panel's decision should be reconsidered. Gore v. Dugger, No. 89-4026 (11th Cir. July 23, 1991) (Order denying petition for rehearing in banc).

Each Judge on the Gore panel has extensive experience in reviewing claims of Hitchcock error in Florida cases, having rendered rulings in such cases on a number of occasions. Judge Fay was the author of the lead opinion in Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), a case in which the Hitchcock error was found harmless beyond a reasonable doubt. Demps, like Clark, is a case on which the Florida Attorney General has often relied to argue that this Court should grant certiorari and reverse the Eleventh Circuit's ruling in cases where a Hitchcock error is

found not to be harmless beyond a reasonable doubt. See, e.g., Singletary v. Jackson, 111 S.Ct. ___ (1991) (Attorney General's petition for writ of certiorari). The standard which Judge Fay specified as the appropriate one was stated as follows:

> To be harmless in the Hitchcock context, the court must determine beyond a reasonable doubt that the proposed mitigating evidence regarding the defendant's character would not have influenced the jury to recommend a life sentence.

Demps, 874 F.2d at 1390. Nothing in the Court of Appeals' opinion in Gore suggests that this standard was ignored, overlooked, or not applied when the Court reviewed Chief Judge Hodges' ruling. See Gore, 933 F.2d at 905 ("This panel unanimously agrees that under the circumstances of this particular trial, the omission of the nonstatutory mitigating evidence in violation of the Lockett/Hitchcock principle cannot be found to be harmless.")

Judge Fay's ruling that the error was harmless in Demps was also based on "the circumstances of [the] particular trial" at issue.[4] Judge Fay found that the error was harmless in Demps because:

> a. As to mitigation relating to the petitioner's history of drug addiction: "[W]hile the evidence of a history of drug addiction can be mitigating evidence, we believe that the circumstances in this case indicate beyond a reasonable doubt that this evidence would not have influenced the jury to mitigate Demps' sentence."

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[4] As discussed subsequently in this response, contrary to the Attorney General's suggestions, nothing in the Gore opinion suggests that the Court did not consider the specific circumstances of Mr. Gore's case, including the value of the excluded mitigation and the aggravating factors. Indeed, the Court of Appeals expressly indicated that its ruling was based on "the circumstances of this particular trial." Gore, 933 F.2d at 905.

Demps, 874 F.2d at 1390 (emphasis supplied).

b. As to the mitigation relating to the petitioner's military record: "[W]e are persuaded that the evidence would not have influenced the jury to recommend life." Id.

c. As to the petitioner's record while in prison prior to the offense: "Like his history of drug abuse, this evidence can be classified as mitigating. See, e.g., Skipper, 476 U.S. 1 [1986] ... [But] Demps' record would not have affected the mind of a juror in any way where the murder for which the jury recommended death occurred in the prison." Demps, 874 F.2d at 1390 (emphasis in original).

d. As to alleged disparate treatment of codefendants: "... Demps' prior criminal record was sufficient to justify imposing a more serious penalty." Id. at 1391.

Judge Fay was one of the panel members involved in the unanimous ruling in Gore. Judge Fay's agreement, and a comparison of the opinions in Demps and Gore, demonstrate that the panel was keenly aware that in considering whether the Hitchcock error was harmless it was to review the totality of the circumstances of "this particular trial." Indeed, in Gore, the Court expressly said that this is what it did. See Gore, 933 F.2d at 905.

Chief Judge Tjoflat, like Judge Fay, also has not hesitated to rule that a Hitchcock error is harmless when the facts of the "particular trial" suggest that conclusion. Chief Judge Tjoflat was, in fact, a member of the panel in Clark (which, as discussed above, found the Hitchcock error there at issue harmless beyond a reasonable doubt). In Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989), applying a standard akin to the one discussed by Judge Fay in Demps, Chief Judge Tjoflat wrote:

> We recognize that Lockett error can be harmless. See Hitchcock, 481 U.S. at 398, 107 S.Ct. at 1824. If the

> state can prove beyond a reasonable doubt that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation, the error is harmless and the recommendation may stand. See Chapman v. California, 386 U.S. 18, 24 [1967]. For example, if the defense produces no nonstatutory mitigating evidence, the judge's failure to instruct the jury that its consideration is not limited to the seven statutory mitigating circumstances would constitute harmless error and no reason to require resentencing would exist. Similarly, resentencing is not required where the nonstatutory mitigating evidence presented was so insignificant that it would not have altered the jury's decision.

Jones, 867 F.2d at 1279-80 (emphasis supplied). Jones was cited by the unanimous panel in Gore, 944 F.2d at 905.

Judge Johnson was a member of the unanimous panel joining Chief Judge Tjoflat's opinion in Jones and was also an member of the unanimous panel in Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991), a case in which the Court of Appeals noted that because the excluded mitigation would have been "significant" to the jury's decision the error could not be said to be harmless beyond a reasonable doubt. This Court recently denied the Attorney General's petition for writ of certiorari in Jackson, see Singletary v. Jackson, 111 S.Ct. ___ (1991), a petition which presented a request for certiorari review based on arguments akin to those now presented in Mr. Gore's case.

A review of the Eleventh Circuit's opinions in cases involving Hitchcock error -- indeed, of the opinions of the same Judges who sat on the panel in Mr. Gore's case -- thus demonstrates that the Court of Appeals has consistently followed this Court's precedents regarding the appropriate standard of constitutional harmless error review.

First, the standard applied is the Chapman v. California,

386 U.S. 18 (1967), standard. See Jones, 867 F.2d at 1279, citing and relying on Chapman v. California (finding the error not harmless beyond a reasonable doubt); Demps, 874 F.2d at 1389, citing and relying on Chapman v. California (finding the error harmless beyond a reasonable doubt); Clark, 834 F.2d at 1570, citing and relying on Chapman v. California (finding the error harmless beyond a reasonable doubt); see also Gore, 933 F.2d at 905 (citing to page 1279 of Jones). The Court of Appeals has also consistently heeded this Court's opinions in cases such as Satterwhite v. Texas, 486 U.S. 249 (1989), and Skipper v. South Carolina, 476 U.S. 1 (1986), addressing the application of the Chapman standard to constitutional errors at the sentencing phase of a capital trial. See Jackson, 931 F.2d at 716, citing and relying on Skipper v. South Carolina; Jones, 867 F.2d at 1279-80, citing and relying on Skipper v. South Carolina; see also Gore, 933 F.2d at 905, citing and relying on page 1279 of Jones. The State's suggestion (petition at pp. 15-16) that the Eleventh Circuit Court of Appeals' opinions overlook Chapman is inconsistent with the Court of Appeals' precedents.

Second, contrary to the suggestions in the State's petition (pp. 10-11, 14), in considering harmless error questions the opinions of the Court of Appeals -- and, again, the opinions of the very Judges who presided in Mr. Gore's case -- have looked to the totality of "the circumstances of [the] particular trial." Gore, 933 F.2d at 905. The panel unanimously said that that is what it had done in Gore itself. See also Demps; Jones; Jackson; Clark (each analyzing the totality of the circumstances). Such

an analysis includes consideration of the aggravation and the nature (i.e., the quality) of the mitigation excluded from the jury's consideration. Cf. Petition for Writ of Certiorari, pp. 10-11 and 14 (arguing that the Court of Appeals' precedents do not consider the quality of the mitigation). Thus, in Jackson, because there existed "significant" mitigating evidence which would have affected a reasonable juror, the error was found not to be harmless beyond a reasonable doubt. The Court of Appeals applied a similar analysis in Jones and in Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991).[5]

On the other hand, as Judge Fay's opinion in Demps indicates, even where the excluded evidence is mitigating in nature the Court of Appeals will find the error harmless beyond a reasonable doubt under Chapman when the totality of "the circumstances in [the particular] case indicate beyond a reasonable doubt that [the excluded] evidence would not have influenced the jury to mitigate [the petitioner's] sentence." Demps, 874 F.2d at 1390. The errors were found harmless by the Court of Appeals in Demps, Clark, and Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989), under the Chapman standard; they were found not harmless beyond a reasonable doubt in Jones, Jackson, and

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[5] This Court recently denied petitions for writs of certiorari filed by the Florida Attorney General in Jackson, Singletary v. Jackson, 111 S.Ct. ___ (1991), and Booker, Singletary v. Booker, 111 S.Ct. ___ (1991). These petitions presented the same arguments as those now asserted in Mr. Gore's case.

Gore under that same standard.[6]

Contrary to the State's suggestion, in each category of cases the Court of Appeals' precedents demonstrate that the Court has consistently applied the Chapman standard to the totality of the circumstances of the particular case at issue. And the Court reviewed the circumstances of "this particular trial" in Mr. Gore's case. See Gore, 933 F.2d at 905.

In Mr. Gore's case, the veracity and mitigating nature of the excluded evidence was not questioned by the State before the District Court or Court of Appeals, and the State has not questioned the veracity and mitigating nature of the evidence before this Court. The District Court found the evidence to be reliable, credible, and mitigating in its nature. The Court of Appeals affirmed each of these aspects of the District Court's ruling. After noting that harmless error analysis is applicable to cases involving Hitchcock/Lockett error, the Court of Appeals wrote, "This panel unanimously agrees that under the circumstances of this particular trial, the omission of the nonstatutory mitigating evidence in violation of the Lockett/Hitchcock principle cannot be found tc be harmless." Gore, 933 F.2d at 905. Given its precedents, see, e.g., Jones, 867 F.2d at 1279 (cited by the panel in Gore), the Court could not have so ruled if the mitigating evidence at issue was "insignificant" to the jury's consideration "under the circumstances of this particular trial."

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[6] This Court has denied certiorari petitions in each category of cases. See, e.g., Clark, 485 U.S. 982 (1988); Tafero, 110 S.Ct. 1834 (1990); Demps, 110 S.Ct. 1834 (1990).

The precedents of the Court of Appeals, particularly those of the Judges who presided in Mr. Gore's case,[7] the Court's consistent application of the Chapman standard, and "the circumstances of [Mr. Gore's] particular trial" all demonstrate that no true question, issue, or ground warranting certiorari review or a reversal of the Court of Appeals' ruling is involved in the Attorney General's petition in this case. The Respondent does acknowledge -- as the panel indicated -- that there exists "some disagreement" in the Court of Appeals as to whether it is proper for the reviewing court to grant relief when the excluded evidence cannot be deemed to involve "significant" mitigation. See, e.g., Delap v. Dugger, 890 F.2d 285, 306 n.23 (11th Cir. 1989). Judge Fay and Chief Judge Tjoflat (two of the three Judges on Mr. Gore's panel), however, are the two Eleventh Circuit Judges who have taken the most restrictive view, consistently espousing the principle that where the evidence cannot be deemed to involve "significant" mitigation or where the totality of the circumstances indicate that the error had no effect on the jury, the error should be deemed harmless. See Demps; Clark; Jones.

What "disagreement" there may exist in the Court of Appeals was and remains irrelevant to the disposition of Mr. Gore's case. The unanimous ruling of Chief Judge Tjoflat, Judge Fay, and Judge Johnson "that under the circumstances of this particular trial, the omission of the nonstatutory mitigating evidence" in

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[7] Judges who have found Hitchcock errors harmless when the totality of the circumstances have so suggested.

violation of Lockett and Hitchcock cannot be deemed harmless beyond a reasonable doubt presents absolutely no controversy warranting this Court's review.

When stripped of its hyperbole, reviewed in the light of the Court of Appeals' actual precedents, and considered in the context of the circumstances of this case, Respondent respectfully submits that the State's petition for writ of certiorari here, like the one recently denied in Singletary v. Jackson, 111 S.Ct. ___ (1991), involves little more than the Attorney General's disagreement with the Court of Appeals' ultimate disposition. That disagreement surely does not warrant a grant of certiorari review.

In sum, there is no controversy -- no "hopeless conflict" (see petition, p. 16) -- relevant to the disposition of this case, a case in which the District Court and Court of Appeals found that the state trial court's refusal to allow the jury to consider relevant, credible, reliable, and significant evidence of a mitigating nature was not harmless beyond a reasonable doubt. The Court of Appeals' panel included the two Eleventh Circuit Judges who have espoused the most restrictive view in the area -- i.e., that Hitchcock/Lockett error can and should be found "harmless" where the omitted mitigating evidence lacks significance or where the totality of the circumstances of the "particular trial" at issue demonstrate that the error resulting from the exclusion of the mitigating evidence is harmless.

By no means can it be fairly said that the panel in Mr. Gore's case took the position that "any attempt to 'wrestle' with

the [harmless error] issue would only result in further conflict" (petition, pp. i and 7); rather, the panel "unanimously agree[d]" that under any harmless error formulation the error involved in "this particular trial" was not harmless beyond a reasonable doubt. Compare Gore, 933 F.2d at 905, with Delap, 890 F.2d at 306 n.23 (applying a similar analysis), cert. denied 110 S.Ct. 2628 (1990). There is no reason to disturb the Court of Appeals' ruling in this case. There is no true controversy warranting the granting of the State's current petition for writ of certiorari.

CONCLUSION

Neither a substantial nor a debatable question is involved in the State's petition, nor does the petition present a controversy warranting certiorari review. The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301 on this 19th day of December, 1991.

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Attorney